IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1154

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

JOSEPH JAMES,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JAMES W. B. BENKARD
Attorney for Respondent
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3400

PHEBE C. MILLER
Of Counsel

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Question Presented for Review*

Whether the New York State Court of Appeals was correct in its holding that New York's capital punishment

* In oral argument before the New York Court of Appeals, respondent's counsel requested that court not to consider those aspects of the arguments presented in respondent's brief and reply brief which could be construed as arguments for a new trial. Specifically retained, however, were respondent's points with respect to the trial court's violation of the principles enunciated in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Respondent did concur with the State that if respondent prevailed on this argument, the appropriate remedy was reduction of respondent's sentence to life imprisonment without disturbing his conviction. The Court of Appeals evidently misunderstood respondent's request and treated the *Witherspoon* arguments as withdrawn, *People* v. *Davis and James*, 43 N.Y.2d 17, 28-29; 400 N.Y.S. 2d 735; 371 N.E.2d 456 (1977). Should this Court grant certiorari and eventually determine that New York's capital punishment provisions are constitutional, respondent requests that this case be remanded to the Court of Appeals for consideration of the *Witherspoon* arguments.

law (Penal Law §§ 60.06 and 125.27(1)(a)(ii)) violates the Eighth and Fourteenth Amendments to the Constitution of the United States because the statute fails to provide the sentencing authority with information as to the character, propensity, record or attributes of the individual offender and denies the defendant a fair opportunity to raise mitigating factors on the issue of punishment.

Statutes at Issue

§ 60.06 Authorized disposition; murder in the first degree

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death.

Added L. 1974, c. 367, § 2 (McKinney 1975).

§ 125.27 Murder in the first degree

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person; and

(a) . . .

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility . . . and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-1 felony.

Added L. 1974, c. 367, § 5 (McKinney 1975).

POINT I

New York's Death Penalty Provisions Are Functionally Identical To Those Already Held Unconstitutional By This Court. Accordingly, The Review Sought Is Unwarranted.

In essence, the New York capital punishment statute is mandatory. If the jury finds that a defendant has committed any one of the three crimes described in section 125.27 of the statute, the court *must* sentence the defendant to death. There is no separate proceeding to determine the extent of the penalty; no opportunity for the defendant to introduce, or for the judge or jury to assess, evidence concerning the character or record of the defendant; no method

by which the defendant can raise mitigating circumstances to diminish the severity of his punishment; and no standards to guide the trial judge in imposing the penalty—other than the absolute command of death. In short, all defendants convicted receive precisely the same punishment.

This mandatory statute then is indistinguishable from those already held constitutionally offensive by this Court in *H. Roberts* v. *Louisiana,* 431 U.S. 633 (1977), and *Woodson* v. *North Carolina,* 428 U.S. 280 (1976). Consequently, the majority of the New York Court of Appeals correctly held that the New York statute could not stand in the light of these decisions. No useful purpose would be served were this Court to grant certiorari in this case and merely reaffirm the views already expressed in *Roberts* and *Woodson.*

Petitioners contend that this statute, or at least the conviction of the respondent, survives constitutional scrutiny because (a) the availability of certain affirmative defenses provides a defendant in a capital case with the option of presenting the jury with possible mitigating circumstances; and (b) the respondent was rightly sentenced to death because at the time he committed the homicide at issue, he had been indicted, but not convicted, of Murder in the Second Degree. We submit, for the reasons set forth in the succeeding sections of this brief, that the New York Court of Appeals correctly rejected these contentions, and that they lack sufficient merit to be considered by this Court.

Petitioners also argue in Point II of their brief (pp. 20-22) that this Court's recent decisions "have not given clear guidance to state legislatures" as to what would be a constitutionally satisfactory death penalty and that, therefore, a decision by the Court of the issues raised by petitioners

in this case would give "significant" guidance to those "across the country" now supposedly wrestling with the problem.

With all due respect, these observations are inaccurate and unrealistic. Decisions such as *Gregg* v. *Georgia,* 428 U.S. 153 (1976), and *Proffitt* v. *Florida,* 428 U.S. 242 (1976), have dispelled prior confusion and pointed the way plainly to a constitutionally acceptable capital punishment system. Even now, the New York State Legislature is in the process of considering such a bill,* drafted carefully on the model of the Georgia and Florida statutes, and no complaints have been heard that the applicable guidelines are unclear.

In point of fact, petitioners are faced with the dilemma of trying to shoehorn an outmoded, discredited mandatory statute into constitutional guidelines set by this Court which clearly reject such an approach. No legislature with an ounce of common sense or decent legal counsel would now wish to enact a statute similar to New York's when all one needs to do is to follow the example of those statutes which have been approved.** Consequently, we submit that the "issues of vital constitutional and societal importance" claimed by petitioners to be presented by this application (Petitioners' Brief, p. 23) do not, in fact, exist.

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* It has been approved by the State Assembly and will shortly be considered by the State Senate.

**Petitioners also argue that this would be an apt opportunity for the Court to resolve the issue left open in *Woodson* v. *North Carolina, supra,* 428 U.S. at 292, fn. 25 (among other cases) concerning the "lifer" who commits a homicide. As respondent was not a "lifer" at the time of the crime at issue here, that question would not be before this Court even were it to grant the petition.

POINT II

The Death Penalty Provisions Under Which Respondent Was Indicted And Tried, As Construed By The New York Court Of Appeals, Do Not Satisfy The Requirements Of The Eighth And Fourteenth Amendments.

A. New York's statutory provisions do not allow consideration of information concerning the character and record of the individual offender

A fatal flaw in New York's death penalty scheme is its failure to allow the sentencing authority to consider the character and attributes of the individual offender in deciding upon his sentence. As pointed out by the majority opinion in the state court, this constitutional deficiency is separate from, albeit related to, the "mitigating circumstance—affirmative defense" issue and, by itself, is sufficient to void the statute. *People* v. *Davis and James,** 43 N.Y.2d 17, 35-36 (1977).

For some time, this Court has emphasized the mandate of our society and Constitution that the sentencing authorities in a capital case have access to information concerning the character and record of the individual defendant whose life is at stake. As early as 1949, the Court noted that:

> "The belief no longer prevails that every offense in a like legal category calls for an identical punishment *without regard to the past life and habits of a particular offender.* This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ." (Emphasis supplied.)

* Hereinafter referred to as *"People* v. *James"*.

Williams v. *New York,* 337 U.S. 241, 247 (1949). *See also Woodson* v. *North Carolina, supra,* 428 U.S. at 296-297; *S. Roberts* v. *Louisiana,* 428 U.S. 325, 333 (1976).

The importance of such access was underscored by the Court's 1976 capital punishment decisions. All three statutes then upheld by this Court at least allow presentation of information with respect to the defendant's character and record, and two of the statutes—those of Florida and Texas—require the sentencing authority to consider the defendant's past record or probable future conduct. *Gregg* v. *Georgia, supra,* 428 U.S. at 164; *Proffitt* v. *Florida, supra,* 428 U.S. at 251; *Jurek* v. *Texas,* 428 U.S. 262, 269 (1976). In *Jurek,* the Court stated that:

> "Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . [A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

Jurek v. *Texas, supra,* 428 U.S. at 275-276. By contrast, an independent constitutional shortcoming of both the North Carolina and Louisiana statutes was their:

> "failure to allow the *particularized consideration of relevant aspects of the character and record of each convicted defendant* before the imposition upon him of a sentence of death." (Emphasis supplied.)

Woodson v. *North Carolina, supra,* 428 U.S. at 303; *see also S. Roberts* v. *Louisiana, supra,* 428 U.S. at 333; *H. Roberts* v. *Louisiana, supra,* 431 U.S. at 636.

New York's statute shares this shortcoming. Instead of receiving "all possible relevant information about the individual defendant," New York juries are not at any stage of a murder trial allowed to consider the character, past record, or probable future conduct of the defendant in reaching their determination as to his guilt or innocence. A similar stricture, of course, is imposed upon the trial court, which has no discretion in the matter of penalty once a verdict of guilty is returned.

The New York Court of Appeals was alert to this deficiency and found that the defenses permitted under New York's death penalty scheme simply:

> ". . . do not take into account the character, propensity, record or attributes of the individual offender."

People v. *James*, 43 N.Y.2d 17, 35 (1977).

This interpretation of New York's law by its highest court is not only legally binding (*see Green* v. *Neal's Lessee*, 31 U.S. [6 Pet.] 291 [1832]) but logically compelling. The availability of the affirmative defenses cited by petitioners is no answer; for, as Judge Cooke noted:

> ". . . an unblemished record and evidence of prior good character has never been considered as a defense, and probably never will be."

People v. *James*, 43 N.Y.2d at 35.

Of the six affirmative defenses cited by petitioners as alleged "mitigating circumstances," only two—the traditional infancy and insanity defenses—relate to the general character of the offender rather than to the specific circumstances of the offense. These two defenses, present to some extent in every death penalty scheme that has been struck down by this Court, say nothing about the offender's record or probable future conduct and thus fall far short of the con-

stitutionally mandated focus on "the particularized characteristics of the individual defendant." *Gregg* v. *Georgia*, *supra*, 428 U.S. at 206.*

Like Louisiana and North Carolina, New York cannot satisfy the Eighth Amendment by focusing on the offense and ignoring the offender. As the Court below found:

> "While there may be some visual or empirical satisfaction derived from counting and generally comparing the New York defenses with the mitigating factors endorsed by the Supreme Court, the fact is that these defenses do not require consideration of the character and record of the individual in respect to his sentence or punishment as mandated by the Supreme Court. . . ."

People v. *James*, *supra*, 43 N.Y.2d at 35.

B. New York's death penalty scheme does not allow consideration of mitigating circumstances as part of the sentencing decision

As noted above, a separate but related flaw in New York's statutory scheme is the fact that the jury and the trial judge are denied the right to consider *any* mitigating circumstances as part of the sentencing decision. This Court has repeatedly emphasized the constitutional mandate that "the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *H. Roberts* v. *Louisiana*, *supra*, 431 U.S. at 637 (1977). The failure to

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* Indeed, the Supreme Courts of both California and Maryland have held that exclusion from the death penalty of those under a certain age did not provide a constitutionally sufficient individualized consideration of the offender. *Rockwell* v. *Superior Court of Ventura County*, 18 Cal.3d 420, 134 Cal. Rptr. 650, 556 P.2d 1101, 1112 (1976); *Blackwell* v. *State*, 278 Md. 466, 365 A.2d 545, 549 (1976).

allow such a particularized consideration as part of the *sentencing* decision is the essence of a mandatory death penalty and the source of its constitutional infirmities: impermissible prejudice to the accused and unchecked jury discretion.

Recognizing this problem, petitioners contend that mitigating factors are, in essence, available to a defendant because, to some extent, such factors could be raised in the context of an affirmative defense. Thus, urge petitioners, mitigating circumstances may be incorporated into the definition of the substantive offense just like aggravating factors (*see Jurek* v. *Texas, supra,* 428 U.S. at 270-271; petitioner's brief at p. 13). This equation is unsupported by logic or justice.

Inclusion of an aggravating factor within the definition of an offense means that the state must introduce at trial and prove the existence of this additional element beyond a reasonable doubt in order to obtain a guilty verdict. The consequence, as this Court found, is that "the death penalty is an available sentencing option—even potentially—for a smaller class of murders. . . ." *Jurek* v. *Texas, supra,* 428 U.S. at 271. The effect of melding affirmative defenses with mitigating factors, however, is to place an intolerable burden on the defendant. Any time a defendant raises an affirmative defense, he runs a substantial risk of conviction because he is, in effect, admitting the homicide charged. He must bear the burden of proof and introduce at the guilt phase facts which, most likely, are prejudicial to the issue of whether or not he committed the homicide. In all likelihood, he will have to take the stand, thus exposing himself to cross-examination.

To subject a defendant, who merely wants to raise mitigating factors on the issue of his sentence, to the same

burdens and risks faced by a defendant seeking total exoneration by an affirmative defense would be wrong and unfair. As this Court noted in *Gregg* v. *Georgia, supra,* 428 U.S. at 190:

> "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."

The New York State Court of Appeals considered and rejected petitioners' argument with the following pertinent and practical observations:

> "there is an inherent fallacy in the notion that defenses provide the same function or are as good as or even better than separate consideration of such mitigating factors. The fundamental error in the reasoning is that defenses relate to guilt or innocence whereas a mitigating factor may be of no significance to a determination of criminal culpability. . . . The point is that what is urged in mitigation will often not rise to the level of a defense. For example, in considering the third question of the Texas statute, which asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased, it was remarked: 'This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty—a claim, for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her' (*Jurek* v. *Texas,* 428 U.S. 262, 272, n. 7). In short, statutory defenses alone do not take the place of a distinct consideration of mitigating factors . . . ."

People v. *James, supra,* 43 N.Y.2d at 34.

The state court also pointed out that the Louisiana statute held unconstitutional by this Court in the two *Roberts* cases contains almost the very same affirmative defenses now urged by petitioners as constitutionally sufficient substitutes for mitigating factors. *People* v. *James, supra,* 43 N.Y.2d at 33.

Not surprisingly, therefore, every death penalty scheme that has been upheld by this Court has allowed consideration of mitigating circumstances as part of a sentencing decision distinct from the finding of guilt. *Gregg* v. *Georgia, supra; Proffitt* v. *Florida, supra; Jurek* v. *Texas, supra.*

Finally, there is the additional point that, even if the affirmative defenses could somehow suffice as mitigating factors, the jury is not and realistically could not be given any direction or guidance as to how to weigh these factors.* Like the mandatory statutes of North Carolina and Louisiana, New York's provisions do not guard against a jury's arbitrary exercise of discretion by providing "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson* v. *North Carolina, supra,* 428 U.S. at 303. Therefore, even if evidence of the defendant's character and record somehow filters into a trial, a New York jury is given no standards to guide its weighing of these or other factors against the effect of a conviction, nor is there any way for a reviewing court to learn what considerations were determinative in the jury's decision. As the Court of Appeals concluded:

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* For instance, could the jury be instructed to disregard, for purposes of guilt determination, a statement by a defendant that he committed the murder in question but that he did so under the influence of drugs and therefore does not deserve electrocution? Understandably, petitioners do not address this or similar questions.

> ". . . since New York's statute provides neither for the furnishing of information, without which there cannot be consideration of the individual offender and the circumstances of a particular offense, nor standards to guide the sentencing authority in the use of that information had it been furnished, unconstitutionality is certainly indicated." *People* v. *James, supra,* 43 N.Y.2d at 32.

POINT III

Respondent's Death Sentence Cannot Be Upheld By Consideration Of Charges Which He Was Given No Opportunity To Answer At Trial.

Claiming that respondent was properly sentenced to death because of the "interplay" of the victim's status as a correctional employee and respondent's then pending indictment for murder in the second degree, petitioners request this Court to uphold the death penalty as to respondent even if the provisions by which he was sentenced are deemed unconstitutional "in the general sense" (Petitioners' Brief, p. 15). In essence, petitioners are arguing that respondent's pending indictment branded him as a unique miscreant whose conviction of death should be reinstated notwithstanding the unconstitutional infirmities of the statute which barred him from introducing any countervailing evidence of his character or mitigating factors to move the sentencing authority towards mercy. Petitioners' argument is both factually inaccurate and constitutionally impermissible.

At no point in the trial was the jury apprised of respondent's status—they knew only that he was in a correctional institution and charged with an unnamed felony—so his status could not have been a factor in their finding of guilt.

In fact, introduction of evidence of respondent's earlier indictment, except possibly to impeach respondent's credibility had he testified, would have been grounds for a mistrial, since the earlier indictment was totally irrelevant but highly prejudicial to a finding of guilt under Penal Law § 125.27(1)(a)(ii) or to a sentence under Penal Law § 60.06. *See People* v. *Sandoval*, 34 N.Y.2d 371, 377; 357 N.Y.S.2d 849; 314 N.E.2d 413 (1974); New York Criminal Procedure Law § 280.10(1) (McKinney 1971). It would be even more improper to use respondent's pending indictment, which he had no opportunity to refute or defend at trial, as a retroactive basis for upholding his sentence.

There is also the obvious point that the New York statute does not call for the execution of one, under indictment for a crime that could carry a life sentence, who subsequently is convicted of a separate capital crime. As such, petitioners' request is not for a narrow construction of the statute but for its rewriting to add new elements to the crime—relief which only the New York Legislature, not this Court, can supply.

Lastly, even if the language of § 125.27(1)(a)(ii) limited its application to persons, like appellant, under indictment for crimes carrying a possible life sentence, it would still not be constitutional. This Court has repeatedly and emphatically limited the mandatory provisions that might be constitutional to those involving murder by a prisoner *serving* a life sentence, *Woodson* v. *North Carolina, supra,* 428 U.S. at 287; *S. Roberts* v. *Louisiana, supra,* 428 U.S. at 334; *H. Roberts* v. *Louisiana, supra,* 431 U.S. at 637 n. 5. The basis, at least in part, for this reservation is that such a narrow category may be justified because it is defined in part in terms of the character or record of the offender.

To argue that "there is no constitutionality [sic] significant distinction" between a lifer and a person merely

under indictment (Petitioners' Brief, p. 18) is to equate indictment and guilt and to sweep into the same mandatory death scheme a wide range of possible offenders, from innocent persons terrified by their wrongful indictment or their prison experience to hardened lifers for whom death is the only remaining possible deterrent. If the presumption of innocence means anything, the fact that someone is under indictment cannot be the basis for imposing on him a more severe penalty for a separate offense, on the grounds that his indictment reveals the turpitude of his character. Quite properly, therefore, this Court has not included persons under indictment in its category of persons for whom a mandatory death penalty might be valid.

CONCLUSION

For all of the foregoing reasons, the State's petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be denied.

Dated: New York, New York
March 28, 1978

Respectfully submitted,

JAMES W. B. BENKARD
Attorney for Respondent
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3400

PHEBE C. MILLER
Of Counsel